

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELMO DALBERT,)	NO. CV-05-0231-CI
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S
)	MOTION TO SUBSTITUTE PARTY
v.)	AND MOTION FOR SUMMARY
)	JUDGMENT
MIKE LEAVITT, Secretary of Health)	
and Human Services of the United)	
States,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec 20, 26) and Plaintiff's Motion to Substitute Party (Ct. Rec. 33). Plaintiff Elmo Dalbert, now deceased, is represented by attorney Terry Sawyer, Legal Intern Alex Newhouse and the Center for Justice. Defendant is represented by Assistant United States Attorney Pamela J. DeRusha and Special Assistant United States Attorney Joanne Dantonio.

This is an appeal of the Secretary of Health and Human Services' denial of Medicare reimbursement for non-emergency ambulance services which occurred on December 4, 8, 11 and 13, 2001. The total amount in controversy is \$2,298.00. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 9.)

Plaintiff Elmo Dalbert's motion for summary judgment was filed

1 on March 13, 2006. (Ct. Rec. 20). At the time the non-emergency
2 ambulance services were provided, Plaintiff was 86 years old and had
3 a history of renal failure. He required kidney dialysis three times
4 per week. In December 2001, Mr. Dalbert suffered a broken hip and
5 had surgical repair with an intra medullary rod. (Tr. 00072.)
6 Immediately after the surgery, Plaintiff's treating physician,
7 Curtis Wickre, M.D., FACP (Nephrology), requested that Plaintiff be
8 transported to his dialysis treatment by ambulance. (Tr.00081.)
9 Some of the trips were paid for by Medicare, some were denied. In
10 some cases, the ambulance trip to the treatment was paid for and the
11 return trip was denied. When Medicare refused to pay the costs
12 billed to him by the ambulance company, Mr. Dalbert paid them and
13 submitted requests for reimbursement. Mr. Dalbert claims all should
14 have been covered by Medicare as medical necessities. (Ct. Rec. 21
15 at 19.) After exhausting his remedies at the administrative level,
16 Mr. Dalbert requested review by an administrative law judge (ALJ).
17 The ALJ upheld the agency's denial and the Appeals Council denied
18 review. This appeal followed. Mr. Dalbert died on May 29, 2006.

19 A Motion for Substitution of Party by Plaintiff's granddaughter
20 Francell Daubert, who was appointed the legal representative of the
21 Estate of Mr. Dalbert by order of the Spokane County Superior Court
22 on June 6, 2006, was filed June 30, 2006. (Ct. Rec. 33, 34.) Ms.
23 Daubert has complied with Rule 25 of the FEDERAL RULES OF CIVIL PROCEDURE
24 regarding substitution of party.

25 The government filed its Motion for Summary Judgment on May 22,
26 2006, asserting that substantial evidence supports the ALJ's
27 decision. (Ct. Rec. 26.)

DISCUSSION

The regulations governing Medicare coverage provide that non-emergency transportation by ambulance is appropriate if the beneficiary is bed-confined or it is documented that the beneficiary's condition is such that other methods of transportation is contraindicated. Scheduled, repetitive non-emergency ambulance services are covered if the ambulance provider obtains a written order or certification from the beneficiary's attending physician stating that the medical necessity requirements are met. 42 C.F.R. § 410.40(d)(1)(2).

The ALJ found "[i]t is essentially undisputed that the record contains documentation certifying the beneficiary's eligibility for coverage of ambulance transport." The record contains Plaintiff's treating Physician's Certification that Plaintiff needed medical supervision during his trips for dialysis. However, in upholding the denial of coverage, the ALJ found "the medical evidence of record establishes that the beneficiary was medically able to take alternative transportation; that is, that the beneficiary's condition was not such that transportation other than by ambulance was contraindicated." (Tr. 00029-30.)

In discounting the Physician's Certificate that ambulance transport to treatment was a medical necessity during the time Plaintiff's hip was healing, the ALJ found the nurses' notations that Plaintiff was on two occasions able to get from his bed to the wheelchair was more credible the Plaintiff's treating doctor's statements, which she found "were prepared for the purpose of establishing eligibility for Medicare coverage of services." She

1 also found, "[t]he nurses' progress notes are a more reliable
2 indication of the beneficiary's medical condition." (Tr. 00029.)
3 There is no basis for these findings. The Physician's Certificate
4 required for non-emergency medical transport stated Plaintiff is "on
5 hip precautions and cannot sit safely; cannot support [himself]
6 safely while seated in wheelchair; and requires medical supervision
7 during transport." The treating physician explained Plaintiff's
8 surgery was very painful with leg movements and he was "non-
9 ambulatory." (Tr. 00081, 86, 90, 108.) (Emphasis added.) The fact
10 attending nurses, who arguably observed the Plaintiff on three
11 isolated occasions, noted that Plaintiff was not experiencing pain,
12 could sit up independently in bed and use a wheelchair in the
13 supervised environment of a hospital does not contradict a treating
14 physician's opinion that an 86-year-old dialysis dependent patient
15 cannot sit or support himself "safely" and requires medical
16 supervision during transport to dialysis treatment following hip
17 surgery. On December 8, 2001, the attending nurse noted that after
18 finding Plaintiff had transferred himself from the wheelchair to the
19 bed, Plaintiff was encouraged to wait for "independent transfers and
20 ambulation" until he was released by his physical therapist. (Tr.
21 00075.) This evidence indicates the nurses were not convinced that
22 Plaintiff could safely support himself.

23 Further, a nurse is not an acceptable medical source, and while
24 other source opinions are considered by an ALJ, they are not given
25 more weight than a medical source's opinion. 20 C.F.R. §§
26 404.1513(d), 416.913(d). Here, the medical source who completed the
27 Physician's Certificate was Plaintiff's treating physician or his
28

1 representative. Dr. Wickre is an acceptable medical source,
2 specializing in nephrology. The opinions of a treating source are
3 given considerable weight that can be rejected only with "clear and
4 convincing" reasons. Even if contradicted, specific and legitimate
5 reasons must be given for discounting a treating physician's
6 opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Here,
7 the treating doctor's opinion was contradicted by nurses who saw the
8 Plaintiff on and off during his convalescence. Their notes were
9 made for the purpose of documenting Plaintiff's condition while he
10 was in the hospital, not as an opinion of his ability to transport
11 himself safely to and from the nursing home. The ALJ erred by
12 failing to give "clear and convincing" reasons for rejecting the
13 treating physician's opinions. He also erred when he gave other
14 source opinions more weight the treating physician opinion.

15 Plaintiff also argues the agency's denial of payment was
16 arbitrary and capricious. (Ct. Rec. 21 at 16.) Under the arbitrary
17 and capricious standard of review for agency decisions, the court
18 determines if the agency "considered the relevant factors and
19 articulated a rational connection between the facts found and the
20 choice made." See e.g., *Baltimore Gas and Elec. Co. v. Natural*
21 *Resources Defense Council*, 462 U.S. 87, 105 (1983). The government
22 concedes that in some cases, ambulance costs for return trips were
23 not reimbursed, while the trip to the hospital was covered. The
24 government states,

25 While it is difficult to discern the reasons why Medicare
26 chose to approve coverage for some ambulance services
27 while denying coverage for the services at issue here, the
28 approved ambulance services were not at issue before the
ALJ. The ALJ's role was simply to apply the law to the
denied coverage requests before her, and the record

1 reveals that the ALJ did so properly,
2 (Ct. Rec. 27 at 6.) This argument is unconvincing and does not
3 articulate a rational connection between the facts and the decision
4 to pay for transport one way, and deny payment for transport the
5 other way on the same day, where there is no evidence of any change
6 in Plaintiff's condition during the two-three hour interim.

7 **CONCLUSION**

8 Upon review of the record in its entirety, including testimony
9 of the deceased Plaintiff, the court finds the agency's decision to
10 deny payment and reimbursement for non-emergency ambulance service
11 was arbitrary and capricious, and the ALJ erred in upholding the
12 agency's decision. There is not substantial evidence to support the
13 ALJ's findings that the services were not "medically necessary" and,
14 therefore, not "covered" services under the applicable regulations.
15 Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 20) is
18 **GRANTED.**

19 2. Defendant's Motion for Summary Judgment (Ct. Rec. 26) is
20 **DENIED.**

21 3. Plaintiff's Motion to Substitute Party (Ct. Rec. 33) is
22 **GRANTED,** and Francell Daubert, deceased Plaintiff's legal
23 representative, is substituted as the party in interest.

24 4. The Defendant shall reimburse Plaintiff's estate, by and
25 through Francell Daubert, \$2,298.31 for ambulance transportation
26 costs.

27 The District Court Executive is directed to enter this Order,
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1 enter judgment for the Plaintiff, and forward copies to counsel, and
2 thereafter shall close this file.

3 DATED August 15, 2006.

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5 S/ CYNTHIA IMBROGNO
6 UNITED STATES MAGISTRATE JUDGE
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